

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

DON BLANKENSHIP,

Plaintiff,

vs.

FOX NEWS NETWORK, LLC, et al.

Defendants.

Case No.: 2:19-cv-00236

[Hon. John T. Copenhaver, Jr.]

DECLARATION OF ZACHARY A. GIDDING
CONCERNING ESI STATUS

DECLARATION OF ZACHARY A. GIDDING

I, ZACHARY A. GIDDING, declare as follows:

1. I am an associate of the law firm of Early Sullivan Wright Gizer & McRae LLP (“Early Sullivan”), counsel of record for plaintiff Don Blankenship herein. I have personal knowledge of the matters set forth below and if called as a witness could testify competently thereto.

2. For document review of the kind required for this case, Early Sullivan uses Iprotech’s Eclipse document review platform, as well as the other components of the Ipro suite of document processing programs. I am the firm’s administrator for the Ipro suite. For clarity, I will refer to the entire suite as “Ipro.”

3. On December 23, 2020, following a telephonic conference the day before, the Court entered an order granting certain defendants’ motions to compel, and ordering Plaintiff to

produce documents by January 15, 2021. Plaintiff circulated proposed search terms to the Defendants' counsel on December 23, 2020, and invited the defendants to propose further terms or revisions. Counsel for ABC, MSNBC, Fox News, and CNN/Washington Post did so, and Plaintiff's counsel accepted all of the proposed terms and revisions. A true and correct copy of the terms used is attached hereto as **Exhibit A**.

4. Plaintiff had already engaged an e-discovery vendor to acquire and process Plaintiff's raw ESI data, which would then be provided to Early Sullivan to place into the Ipro platform. At all relevant times, and repeatedly, Plaintiff's counsel made clear to the vendor that the purpose of the engagement was to obtain this raw data from Plaintiff's e-mail account and provide it to Plaintiff's counsel for upload and review through Early Sullivan's platform.

5. Although the vendor had billed itself as a top-shelf provider of forensic ESI services, its work was, to say the least, lacking in both professionalism and utility. Despite receiving thousands of dollars to undertake the acquisition and thousands more to expedite the process in light of the Court's order, the vendor did not communicate with the undersigned about what its engineers were doing, despite that I was the one who would need to receive, process, and review the data. My requests for an update from the engineers was answered by the representative servicing the account with a warning that asking the engineers to update me would necessitate them stopping work and delay the project, which given the urgency was not an option. Unannounced, the representative then went on vacation at some point on or about December 23, without leaving an away message, a replacement, or any sign that he was unavailable to service Plaintiff's account and was apparently entirely "out of the loop" with the engineering team. My repeated requests for an update from him on what the engineers were doing, where they were in the process, and so on went either unanswered, or after repeated prodding, answered by the representative referencing the vendor's statement of work (a response akin to a waiter, when asked the status of the meal, pointing to a menu). The representative did not return to work until January 5, 2021.

6. Finally, on January 8, 2021, the vendor informed counsel on a status call that it would not be providing the raw data. Although I had personally made clear several times to the vendor's representative that Early Sullivan had its own platform (Ipro) into which the raw data would be uploaded, and that the data needed to be provided to Early Sullivan sufficiently in advance of January 15 to allow counsel to process and review it, the vendor was totally incapable of doing this. **At no time did the vendor indicate this would not be possible.** Unbeknownst to Plaintiff or his counsel, the vendor's "process" was apparently *not* to acquire and provide the raw e-mail data to Plaintiff or his counsel, but rather to image and "analyze" the data to provide a report on the data (which by the vendor's own admission was of no forensic value whatsoever, particularly so for this particular job), after which Plaintiff's data would be hosted on the vendor's own server and accessed using the vendor's platform (which none of Plaintiff's counsel had ever used or been told about). **This was never made clear to Plaintiff's counsel.** Had we been told that the vendor would not be able to providing the raw ESI for review, we would simply have engaged a vendor who was able to do it. Instead, the vendor failed to disclose this, allowing counsel to wait for weeks for the vendor to admit to being unable to provide what was needed.

7. Needless to say, Plaintiff immediately terminated the vendor and, within hours, had engaged another vendor to acquire the ESI. This second vendor did so promptly and professionally. Early Sullivan first received the .pst files from Mr. Blankenship's gmail account in the morning of Saturday, January 9, 2021, less than 24 hours after the second vendor was hired, and I immediately uploaded the files into Ipro for processing into review. By the morning of Sunday, January 10, 2021, the vast majority of the files had been processed and were available for review. They consisted of approximately 179,000 e-mails and attachments. I immediately narrowed the review set to the documents containing the agreed-on search terms and arranged the documents into review blocks. The review set generated from the search terms consisted of over 90,000 documents, thousands of which were entirely irrelevant e-mails concerning, by way of example, holiday greetings, generic mailing lists, news roundups, investment newsletters,

travel and vacation offers, mobile game promotions, requests for job recommendations. I conducted a brief tally of the most common senders of these irrelevant communications and excluded them from review. This reduced the number of documents to review to approximately 37,000.

8. Beginning in the morning of Monday, January 11, 2021, Plaintiff's counsel at Early Sullivan began working twelve-to-fourteen-hour days to accomplish the review, prioritizing what the parties agreed was the most relevant period, the period leading up to the end of Plaintiff's campaign on or about September 1, 2018. By Thursday, January 14, nine attorneys were reviewing the documents for responsiveness and privilege, and had reviewed approximately 40% of the documents remaining to review. Unfortunately, at 8:31 p.m. on Thursday evening, Ipro crashed, locking the review team out of the platform. While the documents and the tags counsel had applied to them were unharmed, the review team was unable to continue reviewing the documents, and concluded their work for the night. Although I worked with Ipro's support staff into the night, the platform was not restored until the morning of January 15, 2021.

9. On the evening of January 15, 2021, Plaintiff made a production of 5,260 documents, which were all of the documents then ready for production. Counsel continued working through the weekend, and on the evening of January 17, 2021, Plaintiff made a further production of 6,035 documents, and produced 3,681 documents on January 19, 2021. Plaintiff intends to continue doing so every day or two until all responsive, nonprivileged documents from Plaintiff's gmail account have been produced, which counsel expects will be on or before January 25, 2021, based on the resources available.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 21, 2021



ZACHARY A. GIDDING

EXHIBIT A

1. (Greg /3 Thomas)
2. (Gregory /3 Thomas)
3. Stauffer
4. Saavedra
5. Cornelius
6. (Mark /3 Blankenship)
7. Salmon
8. James and Lea
9. “WeDoEpicTV”
10. “Dunbar Printing”
11. Burgess
12. Burdett
13. Burdette
14. Paula and Blankenship
15. MSNBC
16. Chris Hayes
17. Joy Reid
18. “All In With Chris Hayes”
19. Felon!
20. Misdemeanor!
21. Misdemeanant
22. “Upper Big Branch”
23. UBB
24. Explosion! or explod!
25. (mine! /10 safe!)
26. (mining /10 safet!)
27. Massey
28. “Alpha Natural Resources”
29. ANR
30. MSHA
31. “Mine Safety and Health Administration”

32. "united states department of labor" or DOL or "dept of labor"
33. "safety and health report" OR (safety /5 report) OR (health /5 report)
34. "office of miners' health"
35. "independent investigation panel" OR (independent! /10 investigat!) or (independent! /10 panel) OR (investigat! /10 panel)
36. "united states department of justice" or DOJ or "dept of justice" or USDOJ
37. "department of labor"
38. "department of justice"
39. (Senate or senator OR president) and (campaign! or race)
40. disclosure or disclose
41. poll! AND senate
42. poll! AND president
43. consult! AND senate
44. consult! AND president
45. primary or primaries
46. ("west virginia" or WV) AND (senate or senator!)
47. Morrissey or Jenkins
48. Probability or chances or odds or likelihood
49. (primary or election) AND (loss or lost or lose or losing or defeat!)
50. (Cause! or causing) /10 (loss or lost or lose or losing or defeat!)
51. Reason /10 (loss or lost or lose or losing or defeat!)
52. Factor /10 (loss or lost or lose or losing or defeat!)
53. independent and (election or primary or senate or republican! or GOP)
54. reputation
55. character
56. "negative coverage" or "bad press" or smear!
57. good /5 standing
58. (trump /5 blankenship)
59. trump and ("west virginia" or WV)
60. trump and (primary or election or endors! or campaign!)
61. "mainstream media"

62. “establishment media”
63. Litigat! or lawsuit! or “law suit!”
64. (sue or sued or suing) and (media or defam! or slander! or libel!)
65. damages
66. cost and (defam! or libel! or slander!)
67. (business or employment) and opportunity
68. (lawsuit! or “law suit!” or litigat!) and (fund or pay or cost)
69. Board
70. Appoint!
71. “chamber of commerce”
72. Member! and (club or organization or society)
73. (ABC or ABCNews or @ABCWorldNews or @ABCPolitics or @ThisWeekABC) and
(defamation or libel or slander or lawsuit or twitter or tweet or litigation or felon! or
convict!)
74. ABC
75. @ABCWorldNews
76. @ABCPolitics
77. @ThisWeekABC
78. “abcnews.go.com”
79. Ambien
80. “Fox News”
81. Napolitano
82. Cavuto
83. Blakeman
84. Layfield
85. Hamill
86. MacDonald
87. Stirewalt
88. Outnumbered
89. “Coast to Coast”
90. “Evening Edit”

91. "Making Money"
92. Conspir!
93. "false light"
94. NRSC
95. "National Republican Senatorial Committee"
96. "McConnell"
97. "35th PAC"
98. "35th Inc"
99. "Cory Gardner"
100. "Jon Thune"
101. (florida or FL) AND meet!
102. McConnell AND meet!
103. (NRSC or "National Republican Senatorial Committee") AND meet!
104. Trump AND meet!
105. "menu of items"
106. (Morrisey OR Jenkins) AND (McConnell OR NRSC OR "National Republican Senatorial Committee")
107. "push poll"
108. poll and felon
109. "Probation and Pretrial Services"
110. application /5 bond
111. application /5 release
112. manslaughter
113. "victim impact statement"
114. Survivor! and statement
115. Survivor! and report
116. (survivor! or victim!) and (trial or sentencing)
117. (poll! or perception! or belief! or perceiv! or believ!) and (conviction or trial or explosion or UBB or "Upper Big Branch")
118. Poll! or sampling or survey!
119. (Death! or dead or died) /10 miner!

- 120. Campaign!
- 121. Trial or jury or acquit! or verdict or guilty
- 122. Convict! or “ex-con” or criminal or crime!
- 123. Sentenc!
- 124. Prison or jail
- 125. “Obama’s Deadliest Cover-up”
- 126. “Obama’s deadliest coverup”
- 127. “blood on their hands”
- 128. “American political prisoner”
- 129. Newsroom
- 130. Unfiltered
- 131. “CNN Tonight”
- 132. Cupp
- 133. “Don Lemon”
- 134. “Dana Bash”
- 135. Milbank
- 136. Dawsey
- 137. “Jenna Johnson”
- 138. “Amber Phillips”
- 139. CNN
- 140. “Washington Post”
- 141. “Gregthomaswv”
- 142. “Roman.stauffer”
- 143. “Kirstensaavedra”
- 144. “Robcwv”
- 145. “markblankenship.com”
- 146. “Wedoepic.tv”
- 147. “dunbarprinting.com”
- 148. “jburgess5690”
- 149. “nate.burdette99”
- 150. “Paula.donb”

- 151. “pmbblankenship”
- 152. “pat.donb”
- 153. trump and (twitter or tweet)
- 154. “don jr” or “donald jr”
- 155. convict or “ex-con” or convicted or criminal or crime
- 156. jury or acquit or verdict or guilty or jail
- 157. deaths or “dead miners”
- 158. poll or polls or polling or sampling or survey
- 159. chances or odds or likelihood
- 160. John /3 Verhovek
- 161. Brian /3 Ross
- 162. MaryAlice /3 Parks
- 163. “Mary Alice” /3 Parks
- 164. Emily /3 Goodin
- 165. McGraw
- 166. Meridith
- 167. *@abc.com
- 168. racist or racism or “chinapeople” or “china people” or “china person” or
“chinaperson” or “Mountain Families”